Supreme Court, U.S.
FILED

981014 DEC 23 1998

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AIRBUS INDUSTRIE, et al.,
Petitioners,

vs.

LAURA HOWELL LINTON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

How should the courts determine majority government ownership in an "instrumentality of a foreign state" under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1994)?

PARTIES TO THE PROCEEDING

Petitioners are Airbus Industrie, GIE and Aeroformation, GIE.[1] Petitioners are defendants in the underlying litigation now pending in the 23rd Judicial District Court of Brazoria County, Texas, and were the respondents in the Texas Court of Appeals appellate proceeding from which this petition for writ of certiorari arises.

Respondents are Laura Howell Linton, individually and as the personal representative of the Estates of Andrew Jay Howell and Sarah Stoll Howell, Deceased, and on behalf of Rena Howell, Margaret F. Howell, Nell Jones and any other proper legal beneficiaries of Andrew Jay Howell and Sarah Stoll Howell; Rena Howell, individually, Margaret F. Howell, individually, and Nell Jones, individually; Ratna Patel (Vaghjiani) and Valbai Patel (Vaghjiani), individually and as executors and personal representatives of the Estates of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani, Deceased, and on behalf of and as the next friends of Tulsi Vaghjiani and on behalf of Lalji Karsan

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[1] Petitioner Airbus Industrie is a *Groupement d'Interet Economique* (GIE) under French law, which is a legally separate entity resembling a partnership of companies. *See* fn.4, *infra*. Its member companies are Aerospatiale Societe Nationale Industrielle ("Aerospatiale") (which has a 37.9% interest in Petitioner); British Aerospace (Operations) Ltd. (which has a 20.0% interest in Petitioner); DaimlerChrysler Aerospace Airbus GmbH (formerly known as "Deutsche Airbus", by which it is referred to in the lower court proceedings and will be referred to in this Petition so as to avoid confusion) (which has a 37.9% interest in Petitioner); and Construcciones Aeronautics S.A. ("CASA")(which has a 4.2% interest in Petitioner).

Petitioner Aeroformation was a GIE which was dissolved in 1994 and therefore has no parent companies or nonwholly owned subsidiaries. Airbus Industrie held a 90% interest in Aeroformation, with the remaining 10% interest being held by a private company, Flight Safety International.

Vekaria and Kanbai Lalji Vekaria and any other proper legal beneficiaries of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani; Ratna Patel (Vaghjiani) and Valbai Patel (Vaghjiani) as the next friends of Tulsi Vaghjiani, individually, Lalji Karsan Vekaria, individually, and as the executors and personal representatives of the Estate of Rakhee J. Patel, Deceased, and on behalf of and as the next Friends of Deena J. Patel and any other proper legal beneficiaries of Rakhee J. Patel; Neeta J. Patel and Jaisukh A. Patel and as the next best friends of Deena J. Patel, individually; and Mr. & Mrs. Stan Moss, individually and as Temporary Administrators of the Estate of Alison Leslie Moss. Respondents are plaintiffs in the underlying litigation now pending in the 23rd Judicial District Court of Brazoria County, Texas, and were the appellants in the Texas Court of Appeals appellate proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Airbus Industrie ("Airbus") and Aeroformation (collectively the "Airbus Defendants") respectfully pray that a writ of certiorari issue to review the decision of the Texas Fourteenth Court of Appeals dated September 12, 1996. The Texas Fourteenth Court of Appeals reversed the Order of the 23rd Judicial District Court of Brazoria County, Texas, that the Airbus Defendants were immune from the jurisdiction of all United States courts under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611 (1994). The Airbus Defendants subsequently sought review by the Supreme Court of Texas, which declined to exercise its discretionary right to hear the appeal and denied the Airbus Defendants' Petition for Rehearing on October 1, 1998.

OPINIONS AND ORDERS BELOW

The October 1, 1998, order of the Supreme Court of Texas denying the Airbus Defendants' Petition for Rehearing is not reported, and is reprinted as Appendix A hereto.

The order of the Supreme Court of Texas denying the Airbus Defendants' Application for Writ of Error is not reported and is reprinted as Appendix B hereto.

The order of the Texas Fourteenth Court of Appeals denying the Airbus Defendants' motion for *en banc* consideration is not reported and is reprinted as Appendix C hereto.

The order of the Texas Fourteenth Court of Appeals denying the Airbus Defendants' motion for rehearing is not reported and is reprinted as Appendix D hereto.

The order of the Texas Fourteenth Court of Appeals reversing the judgment of the trial court and denying immunity under the FSIA to the Airbus Defendants is reported at *Linton v. Airbus Industrie*, 934 S.W.2d 754 (Tex. App. 1996), and is reprinted as Appendix E hereto.

The order of the 23rd Judicial District Court of Brazoria County, Texas, granting the Airbus Defendants' motion to dismiss for lack of jurisdiction under the FSIA is not reported and is reprinted as Appendix F hereto.[1]

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the September 12, 1996, decision of the Texas Fourteenth Court of Appeal, which held that the Airbus Defendants were not instrumentalities of a foreign state and therefore were not immune under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1994), and reversed the trial court's order dismissing the action against the Airbus Defendants.

Petitioners filed a timely Application for Writ of Error to the Supreme Court of Texas, which declined to exercise its discretion to review the matter. Petitioners thereafter filed a timely Petition for Rehearing. The Supreme Court of Texas denied the Petition for Rehearing on October 1, 1998. Jurisdiction of this Court to

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[1] The 23rd Judicial District Court decision followed a remand of this action by the U.S. District Court for the Southern District of Texas. This action had an extensive history in the federal courts which is not relevant to this petition, and which is therefore omitted.

review the decision of the Texas Court of Appeals is invoked under 28 U.S.C. § 1257(a) (1994). *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

STATUTORY PROVISIONS INVOLVED

Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1994):

> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (a), (b) (1994):

> **§ 1603. Definitions**
>
> For purposes of this chapter —
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political

subdivision thereof, and

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Decree No. 67-821 of September 23, 1967, J.O., September 28, 1967, p. 9537 (as amended):

> [A translation of the French statute governing the creation and operation of a GIE is set forth in Appendix G.]

STATEMENT OF THE CASE

This case arises out of the crash near Bangalore, India, of an Airbus A320 model aircraft. The aircraft was assembled by Airbus in France and was delivered to Indian Airlines in France. It was operated in India by Indian Airlines using crews of Indian nationals, most of whom had been trained in India by Indian Airlines and some of whom had received some training in France from Aeroformation. The crash was investigated in India by Indian government authorities, who concluded that the crash was caused solely by pilot error. None of the passengers or crew were residents of the United States.

Despite the complete lack of any connection of the accident with either the State of Texas or, for that matter, the United States, the Plaintiffs instituted two separate actions in the 23rd Judicial District Court of Brazoria County in Angleton, Texas.[2] Both actions

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[2] The defense of *forum non conveniens* is not available to the Airbus Defendants in Texas state court. *See Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990). Although the Texas Legislature (continued)

were timely removed by the Airbus Defendants to the United States District Court for the Southern District of Texas and consolidated. Jurisdiction for removal was based on two independent grounds of federal court jurisdiction: (1) diversity jurisdiction under 28 U.S.C. § 1332 (1994), because all the United States parties, Plaintiffs, and Defendants, were diverse, and the foreign parties were additional parties; and (2) federal question jurisdiction under the FSIA, 28 U.S.C. § 1330(a) (1994), and 28 U.S.C. § 1441(d) (1994), because the Airbus Defendants were agencies or instrumentalities of foreign states. After removal, the Plaintiffs filed motions to remand their respective actions to state court. The motions to remand were granted, and Petitioners appealed the remand order to the Fifth Circuit. The Fifth Circuit ultimately decided it lacked jurisdiction to hear the Airbus Defendants' appeal of the remand because it was not a final order. *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994).

As soon as the action was returned to the Brazoria County court, the Airbus Defendants entered special appearances and moved to dismiss the action for lack of personal and subject matter jurisdiction upon the ground that they were agencies or instrumentalities of a foreign state, and thus immune under the FSIA.

On February 9, 1995, the 23rd Judicial District Court of Brazoria County entered an Order granting the Airbus Defendants' motion to dismiss. The Order adjudged that

> Defendants Airbus Industrie and Aeroformation are foreign states under the Foreign Sovereign

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(fn. continued)
legislatively overruled *Alfaro*, Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (1986 & Supp. 1999), the new statute does not apply to this case because it was filed before September 1, 1993, the effective date of the new statute.

> Immunity Act, 28 U.S.C. § 1602, *et seq.*, and that no exceptions to the FSIA apply; therefore, Defendents Airbus Industrie and Aeroformation are absolutely immune from suit in the United States.

Appendix F. It further ordered that "this case is dismissed for lack of subject matter jurisdiction over Airbus Industries (sic) and Aeroformation." *Id.*

The plaintiffs filed a timely appeal to the Texas Fourteenth Court of Appeals.[3] That court reversed the decision of the Brazoria County court, holding that Respondents were *not* instrumentalities of a foreign state entitled to immunity under the FSIA. The Court of Appeals reasoned that although the overall total ownership shares of the French, German and Spanish governments in the member companies of Airbus exceeded 60%, the German governmental ownership share of Deutsche Airbus, the German member company of Airbus, was only 49.25%, and thus had to be excluded from the FSIA calculation because Deutsche Airbus did not itself qualify as an agency or instrumentality of a foreign state under the FSIA. As the combined French and Spanish government ownership shares in the French and Spanish member companies, Aerospatiale and CASA, totaled less than 50% of Airbus, Airbus did not qualify as an instrumentality of a foreign state under the FSIA. Similarly, the Airbus 90% membership interest in Aeroformation could not be considered, and Aeroformation thus also did not qualify under the FSIA.

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[3] Plaintiffs appealed only the portion of the Order that held that Petitioners were instrumentalities of a foreign state. The finding that there were no applicable exceptions to the FSIA's grant of immunity in connection with the crash is therefore final.

The Airbus Defendants filed a timely Application for Writ of Error to the Supreme Court of Texas. The Supreme Court of Texas denied the Application, and on October 1, 1998, denied the Airbus Defendants' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURT'S REFUSAL TO RECOGNIZE PETITIONERS AS INSTRUMENTALITIES OF A FOREIGN STATE IS CONTRARY TO THE MANDATE OF THE FSIA, AND FURTHER ADDS TO THE SPLIT OF AUTHORITY OF THE COURTS ON THE SCOPE OF FSIA IMMUNITY

This Court should grant the requested writ because the decision of the Texas Court of Appeals denying foreign sovereign status to Petitioner is contrary to the mandate of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). The writ should also be granted so that this Court may resolve multiple conflicts between the decisions of the Texas Court of Appeals, the Fifth, Seventh and Ninth Circuits and the Appellate Division of the New York Supreme Court, as to how the percentage of foreign government ownership should be calculated for purposes of determining whether a party is an instrumentality of a foreign state under the FSIA.

As this Court has previously recognized, when Congress enacted the FSIA, one of its express goals was to develop a "uniform body of law" applicable to actions against foreign states in view of the potential sensitivity of such actions. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983).

Review by this Court is needed because each of the above courts has adopted rules for the calculation of governmental ownership which are different and irreconcilable, and which result in inconsistent determinations as to the same party depending solely upon the court in which the lawsuit is filed. Indeed, Petitioner Airbus has been found to be an instrumentality of a foreign state in the Southern District of Texas in Houston, *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 531 (S.D. Tex. 1994), but not in the state courts of Texas in this action. It has been found to be an instrumentality of a foreign state in one courtroom of the Southern District of New York, *Spengel v. Airbus Industrie G.I.E.*, 1997 U.S. Dist. LEXIS 8987 (S.D.N.Y.), but would not be in another courtroom of that District pursuant to the holding of *Gardiner Stone Hunter v. Iberia Lineas Aereas*, 696 F. Supp. 125, 132 (S.D.N.Y. 1995), or in the New York state courts pursuant to the holding of *United Arab Shipping Co. (S.A.G.) v. Salman Al-Hashim*, 176 A.D.2d 569, 574 N.Y.S.2d 743 (1991).

Unless this Court grants review, this multiplicity of inconsistent rules will continue, and the intent of Congress that there be a uniform body of law in this area will be frustrated, with substantial adverse effects on the foreign relations of this country.

A. Congress Intended That There be a Uniformity of Decision by the Courts Under the FSIA

In the legislative history of the FSIA, Congress repeatedly emphasized the importance of a uniform body of law being created for actions against foreign states.

First, in explaining why it was providing for Federal court jurisdiction in such actions, Congress stated:

> Such broad jurisdiction in Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.

H.R. Rep. No. 94-1487 (1976), at 13, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611.

Second, in explaining its decision to exclude jury trials in such cases, Congress stated:

> Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

Id.

Finally, when explaining the decision to grant an absolute right of removal of actions to Federal court to foreign states, Congress stated:

> In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum . . .

H.R. Rep. No. 94-1487, at 32.

This Court recognized the Congressional intent that there be uniformity of decision in *Verlinden, supra*, at 489.

B. The Courts Have Adopted Significantly Nonuniform Procedures for Determining Whether an Entity is an Instrumentality of a Foreign State

At the time it enacted the FSIA, Congress realized that "foreign states are every day participants in commercial activities," H.R. Rep. No. 94-1487, at 7, and that the FSIA would have to recognize that fact. Congress further recognized that such commercial activity could be conducted indirectly, through state owned enterprises that "could assume a variety of forms . . ." It accordingly defined "foreign state" to include an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a) (1994), which in turn is defined as "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b) (1994).

Although application of this definition by the courts has been straightforward where there is an entity in which there is direct majority ownership by a single government, its application has confounded the courts in two other common ownership situations. The first situation is where several different governments jointly own the entity claiming immunity, and no one government individually owns an outright majority interest. This situation has come to be referred to as a "pooling" of government interests. The second situation is where the government ownership of the entity is indirect, for example, where a government owns shares in company A,

and A in turn owns shares in the company which is claiming immunity. This situation has come to be known as a "tiering" of government interests.

With no guidance from either the FSIA or its legislative history as to how to determine the percentage of government ownership in either "pooling" or "tiering" situations, the courts have created a number of contradictory tests. Although most courts that have considered the issue allow governmental ownership interests to be pooled, the courts of the State of New York do not. See discussion at § I.B.1, *infra*. And there are currently at least three different rules in effect as to the propriety of tiering governmental ownership interests: 1) the Ninth Circuit and one court of the Southern District of New York prohibit any tiering; 2) the Seventh Circuit allows tiering at least where each entity through which the tiering is claimed itself qualifies as an instrumentality of a foreign state; and 3) the Texas state courts allow tiering *only* where each entity through which the tiering is claimed itself qualifies as an instrumentality of a foreign state. Other courts appear to allow tiering with no limitations, but have not expressly so stated. See discussion at § I.B.2, *infra*.

This action presents questions of the propriety of both pooling and tiering of governmental ownership. Petitioners are *groupement d'interet economique* ("GIE"), a unique form of commercial partnership established under French law for which there is no American equivalent.[4]

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[4] A GIE . . . is a flexible and user-friendly form of corporate structure, although it tends to baffle Anglo-Saxons — and Americans in particular — used to the rigid structure of the limited company. A GIE is not a company, and escapes many of the obligations of a company. For example, it does not have to publish accounts nor does it have to pay taxes . . . . It simply

(continued)

Petitioner Airbus Industrie was formed pursuant to a treaty among the governments of France, Germany and Spain in 1970. Airbus is composed, in part, of member companies which are partially owned by governmental entities of France, Germany and Spain.[5] The French and Spanish governmental entities each owned a majority interest in the French and Spanish member companies, Aerospatiale and CASA, respectively, but the German government entities owned only 49.25 percent of the

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(fn. continued)

> pools the capital contributed by its members, and its results are taken on to the books of its member companies in proportion to their share of the enterprise.

Matthew Lynn, *Birds of Prey - Boeing vs. Airbus: A Battle for the Skies* 113 (Four Walls Eight Windows 1997).

> In [a] sense, a GIE is an unlimited partnership in which the partners are corporations . . . . [T]he GIE formulation specifies that all partners are jointly and severally liable, up to the full extent of their resources and worth, to third parties to whom the GIE becomes contractually obligated.
>
> . . . . [A] GIE might have no proprietary capital of its own. . . . Also a GIE does not itself incur tax liability; costs, revenues, losses and profits flow through to the members, and any taxable consequences are borne by them under the laws of the state in which they themselves are incorporated. Moreover, the industrial and financial results of GIE activity are considered an integral part of the partners' overall business activities and need not be accounted for or reported separately.

David Weldon Thornton, *Airbus Industrie: The Politics of an International Industrial Collaboration* 91 (St. Martin's Press 1995). A translation of the GIE statute is attached as Appendix G.

[5] Aerospatiale and DaimlerChrysler Aerospace Airbus (formerly Deutsche Airbus) each hold a 37.9% interest in Petitioner Airbus, and CASA holds a 4.2% interest. The remaining 20% interest is held by British Aerospace (Operations), Ltd., a company in which there is no governmental ownership interest.

German member company, Deutsche Airbus.[6] The members of Aeroformation were Airbus, with a 90% interest, and a private company, Flight Safety International.

The Texas court in this action held that all three sets of governmental entities could tier their individual interests, but that pooling of those ownership interests was proper only if each of the entities through which the tiering was accomplished itself qualified as an instrumentality of a foreign state. Thus, Airbus was allowed to pool the governmental ownership interests in Aerospatiale and CASA, its French and Spanish members, but not the 49.25% ownership interest of the German governmental entities in Deutsche Airbus, the German member company. As a result, the Texas court determined that although the governmental ownership in the member companies which comprise Airbus was over 60%, Airbus itself was only 42.1% government owned, and hence did not qualify as an instrumentality of a foreign state under the FSIA and was not immune from the jurisdiction of the Texas state courts.

1. The Courts are Split on Whether Pooling of Ownership Interests by Several Foreign States is Allowed Under the FSIA

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[6] Aerospatiale was 99% owned by the French Republic, CASA was 83% owned by Spain, and Deutsche Airbus was owned 20% by the Republic of Germany, 13.46% by the State of Bavaria, 10.19% by the City of Hamburg and 5.59% by the City of Bremen, with the rest privately owned.

a. The Fifth and Seventh Circuits and the Texas State Courts Allow Pooling of Ownership Interests By More Than One Foreign State

The question of whether pooling of governmental ownership interests is allowed under the FSIA arises because the definition of "instrumentality of a foreign state" refers to the majority ownership of "a" foreign state, and excludes entities organized under the laws of a "third" country. A number of courts, including the Texas court in this action, have been faced with actions where an entity claiming immunity under the FSIA was jointly owned by multiple governments, and in which plaintiffs argued that because no one government owned a majority of ownership interest in the entity, the entity failed to meet the FSIA requirement of majority ownership by "a" foreign state. Likewise, plaintiffs have argued that because the entity claiming immunity was organized under the laws of only one of the owner states, it was organized under the law of a third country as to the remaining owner countries, and that the ownership interest of those countries must thus be excluded.

The majority of courts which have considered the issue of the pooling of ownership interests by several foreign states, including the Texas court in this action, have concluded that such pooling is allowed for purposes of determining the overall percentage of ownership of an entity by foreign states. *Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994); *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 938-39 (7th Cir. 1996); *Le Donne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1405-06 (E.D. Va. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981);

International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

Those courts have generally followed the rationale that multinational entities were well known to Congress at the time the FSIA was enacted, and that denying them the protection of the FSIA would be inconsistent with the foreign relations concerns which underlay the FSIA. Further, some of the courts have noted that 1 U.S.C. § 1 (1994), expressly provides that the singular includes the plural for purposes of the Code. Thus, so long as the entity was organized under the laws of *one* of the owner states, these courts have deemed the entities not to be organized under the laws of a third country.

Petitioners believe that these cases have reached the correct result on the issue of the permissibility of pooling.

b. The New York State Courts Prohibit Pooling by More Than One Foreign State

Although the New York Court of Appeal has not considered the issue, an intermediate New York appellate court has held that pooling is not allowed. In an action involving a ship operated by a company jointly owned by several Persian Gulf nations, the court held, without any further explanation, that "[P]laintiff does not qualify as a 'foreign state' . . . since the plaintiff is . . . a company engaged in commercial activity for profit whose stock is held by at least six foreign nations." *United Arab Shipping Co. (S.A.G.) v. Salman Al-Hashim*, 176 A.D.2d 569, 570, 574 N.Y.S.2d 743, 744 (1991).

2. The Courts are Split on Whether Tiering of Ownership Interests by Foreign States is Allowed Under the FSIA

a. The Ninth Circuit Prohibits any Tiering of Ownership Interests

In *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the Ninth Circuit decided an action in which an entity, the Alberta Pork Producers Development Corporation ("Alberta Pork"), was established pursuant to a statute enacted by the Province of Alberta, Canada, to promote the marketing and sale of hogs raised in Alberta. The court had little trouble finding that Alberta Pork was an agency or instrumentality of the Province of Alberta, based on its similarities to an administrative agency. *Id.* at 1461.

The Ninth Circuit, however, reached the opposite conclusion as to Fletcher's Fine Foods, a pork processing plant in British Columbia, which was 100% owned by Alberta Pork. It reached this result by concluding that "the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it *is defined as* an agency or instrumentality." *Id.* at 1462 (emphasis in the original). Furthermore, the Ninth Circuit noted that Congress had defined agency or instrumentality as an entity owned by a foreign state or a foreign state's political subdivision, but had not expressly included ownership by an agency or instrumentality when it could have, and that the same language was used in the House Report. *Id.* at 1462.

Thus, the Ninth Circuit held that under the FSIA, *no* tiering of foreign state ownership is allowed in qualifying an entity as an agency or instrumentality. It did so

despite having found that "[t]he Act's legislative history suggests that Congress intended the term[] . . . 'agency or instrumentality' to be read broadly," *id.* at 1460, and that extending sovereign immunity all the way down the corporate chain "may very well be desirable," *id.* at 1462.

The *Gates* analysis has been followed in one trial court in the Southern District of New York. *Gardiner Stone Hunter, supra.*

b. The Seventh Circuit Allows Tiering of Ownership Interests, at Least Where Each Entity Through Which the Interest is Tiered Itself Qualifies as an Instrumentality of a Foreign State

In *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996), the Seventh Circuit was faced, as was the Texas court in this matter, with the question of whether the foreign manufacturer of an aircraft that had crashed was an instrumentality of a foreign state. The manufacturer, ATR, was also a GIE created under French law to implement an international treaty, in that case between France and Italy. As in this case, the member companies of ATR were partially owned by their respective governments.[7]

The Seventh Circuit expressly rejected the reasoning of *Gates*. The *Roselawn* court found that the Ninth Circuit had engaged in semantic juggling when it held

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[7] In fact, the French member of the ATR GIE is Aerospatiale, the same company which is the French member of Airbus.

that a definition that *included* an agency or instrumentality within the definition of foreign state for all purposes within the Act but one enumerated section did not result in an agency or instrumentality *being* a foreign state. It further found that the Ninth Circuit's reading made no sense when the FSIA was read as a whole, and had apparently been motivated by the Ninth Circuit's distaste for the concept of broad immunity. It accordingly found that tiering was not prohibited by the wording of the statutory definition.

In *Roselawn,* the ownership of the Italian member by the Italian government was indirect. A majority of the Italian member company was owned by another company, a majority of which was owned by an agency of the Italian government. The *Roselawn* court adopted the reasoning of the trial court that

> so long as the corporate intermediaries standing between a foreign state and a defendant seeking to invoke foreign-state status are themselves majority-owned by a statutorily defined "foreign state" (which, to be explicit, includes an agency or instrumentality of a foreign state), such tiering of ownership interests will not deprive the defendant of foreign state status.

Id. at 939.

c. The Texas Court in This Action Adopted a Rule Allowing Tiering of Governmental Ownership Interests ONLY When Each Entity Through Which the Ownership is Tiered Itself Qualifies as an Agency or Instrumentality of a Foreign State

In this action, the Texas court rejected the reasoning of *Gates* for the same reasons the Seventh Circuit had in *Roselawn*, and determined that tiering of governmental ownership interests was appropriate. However, the Texas court recognized that *Roselawn* had not considered whether the governmental interests of a state whose interest had been tiered through an entity which itself did not qualify as a foreign state could be pooled with the interests of other states whose tiering had been completely through entities that did qualify as foreign states, as had been the case in *Roselawn*. Appendix E-17.

Petitioners urged the court to concentrate on economic reality and look to the ultimate ownership of entities such as Petitioners, i.e., who actually put up the capital for the enterprise and to whom the ultimate profits and losses would flow, for determining the percentage of ownership, rather than focusing exclusively on the business structure that had been used by the foreign states in arranging their investments. The Texas court rejected this realistic approach, and instead decided to mechanically apply the Seventh Circuit test that an entity through which a state's ownership was tiered must independently qualify as an instrumentality. It did so after stating that the decision of Congress that instrumentalities of foreign sovereigns should be entitled to sovereign immunity was inconsistent with prevailing

international law, including the law of France and Germany, and noting that its decision would limit the scope of companies that could claim sovereign immunity. Appendix E-24, E-25; 934 S.W.2d at 764-65. Because Deutsche Airbus, the German member company of Airbus, was only 49.25% owned by German governmental entities, the court therefore completely excluded the German ownership interests in Deutsche Airbus for purposes of applying the FSIA to Airbus. And, having concluded that Airbus was not an instrumentality, the court held that Airbus' 90% membership share in Petitioner Aeroformation could not be counted in determining whether it was an instrumentality, and that Aeroformation was thus also not an instrumentality.

Petitioners thus believe that the Texas court reached its decision based upon extraneous and improper considerations, rather than those specified by the FSIA.

d. Other Courts, Including the Fifth Circuit, Appear to Follow a Test for Determining the Percentage of Government Ownership of an Entity Based Upon the Ultimate Ownership of the Entity

Finally, Petitioners would note that other courts apparently follow the ultimate ownership test urged by Petitioners, although they have not expressly so held. As Petitioners noted previously, Airbus has been found to be an instrumentality of a foreign state in the Southern District of Texas, *Kern*, *supra*, and in the Southern

District of New York, *Spengel, supra*,[8] even though it would not qualify as an instrumentality under the tests adopted by the Seventh and Ninth Circuits or the Texas or New York state courts.

In an earlier appeal in this action, *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994), the Fifth Circuit indicated its apparent willingness to adopt the ultimate ownership test, referring to "the fact that the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity." *Id.* at 597-98. The Fifth Circuit noted that:

> The controlling statute, however, erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity* — not its parent — have a "majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof." [Cite]. There is no mention of "voting" or "control" majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

Id. at 598 n.29. However, the Fifth Circuit found that it did not have jurisdiction to hear Petitioners' appeal, because it arose from what it decided was a nonfinal order, and thus did not decide the issue. Its statement thus currently remains *dicta*.

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[8] In *Spengel*, the plaintiff and codefendant concurred that Airbus Industrie was an instrumentality of a foreign state, and thus filed no opposition to Airbus' motion to strike plaintiff's jury demand.

C. The Decision of the Texas Court is Contrary to the FSIA

1. The Texas Court Decision Arbitrarily Disregards the Rule That the FSIA and its Provisions are to be Read Broadly so as to Minimize the Risk of Irritations in Foreign Relations

As the legislative history makes clear, "[t]he broad purposes of the [FSIA] are 'to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.' " *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary on H.R. 11315*, 94th Cong. 29 (1976) (testimony of Monroe Leigh, quoting from the letter transmitting the proposed Act from the Deputy Secretary of State and the Deputy Attorney General to the Speaker of the House).

Accordingly, the courts have widely recognized that the FSIA, and its definition of a foreign state, is to be read broadly so as to fully implement its intent. *See, e.g., In re Texas E. Transmission Corp. PCB Contamination Coverage Litig.*, 15 F.3d 1230 (3d Cir. 1994); *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990); *Roselawn, supra*, at 940; *Gates, supra*, at 1460.

Although it acknowledged this principle, the Texas court believed that it applied only to the removal provisions of the Act:

> The legislative history supports a broad application of the removal provision as assuring the availability of a federal forum to promote

> procedural and substantive uniformity in the treatment of foreign sovereigns. . . . We have found no concomitant authority for the proposition that a broad interpretation of §1603(b)(2) in favor of tiering and pooling through non-majority owned intermediaries would promote any underlying purpose of the FSIA.

935 S.W.2d at 763.

The Texas court gave no further consideration to the foreign relations goals of the FSIA. It is difficult to reconcile the concept of a liberally and broadly construed right to remove to Federal court with a narrow reading of the section that defines who is entitled to assert that right. The goal of reducing potential diplomatic frictions is hardly advanced by a narrow reading of the definition of foreign state which arbitrarily deprives foreign governments of the protections of the FSIA. In this case, the Texas court in effect told three foreign countries, France, Germany and Spain, that they are not entitled to the protections of the FSIA simply because one of them owns only 49.25% of its share of an international joint venture, even though they collectively own over 60% of that venture.

2. The Decision of the Texas Court Was Based Upon Its Disagreement With the Congressionally Mandated Presumption of Immunity for the Acts of Instrumentalities of Foreign States

In 28 U.S.C. § 1604 (1994), Congress explicitly mandated that a foreign state "shall" be immune from the jurisdiction of the U.S. courts unless one of the

exceptions enumerated in the Act applies. This Court has repeatedly recognized and upheld that immunity decision:

> "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a ... court lacks subject matter jurisdiction over a claim against a foreign state."

Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993). *See also, Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983), *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 609, 610-11 (1992). As the term foreign state includes an instrumentality of a foreign state, instrumentalities are also *presumptively* immune from U.S. jurisdiction unless one of the statutory exceptions applies.

In deciding whether Airbus was an instrumentality, however, the Texas court took pains to express its disagreement with that statutory presumption. "This presumption, however, runs contrary to the realities of the modern public commercial sector," Appendix E-24; 934 S.W.2d at 765. "Moreover, this presumption is directly contrary to the internationally recognized rule which presumes that foreign state-owned entities with separate legal personalities generally are not entitled to assert sovereign immunity." *Id.* The Texas court went on to note that neither French nor German law presumes publicly owned entities to be immune. Appendix E-24 n.9.

The Texas court clearly based its decision that Petitioners are not instrumentalities of a foreign state at least in part upon its belief that instrumentalities should not be presumptively immune.

In doing so, the Texas court not only acted contrary to Congress' express intent, but appears to have completely

lost sight of the fact that the FSIA itself *removes* the immunity for instrumentalities when they engage in commercial activities that have a direct effect in the United States.[9] As the legislative history clearly notes, the determination of whether an entity claiming to be an instrumentality can assert immunity is a two step process:

> [T]he fact that an entity is an "agency or instrumentality of a foreign state" does not itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions in the bill (see sections 1605-1607 and 1610-1611) was applicable.

House Report at 15. The Texas court completely disregarded this two-step analysis. Rather than first determining whether Airbus was an instrumentality based on overall ownership, as mandated by Congress, and then determining if Airbus was subject to one of the statutory exceptions, the Texas court instead first decided that Airbus should not be immune based on factors other than those specified by Congress, and then refused to recognize Airbus as an instrumentality so as to achieve that result.

This backward analysis also frustrates Congress' desire to preclude the U.S. courts from being burdened with litigation with no real connection with this country. As this Court has recognized, Congress was aware that an overly broad abolition of sovereign immunity could result in the U.S. courts becoming "an international court of claims," and expressly chose to limit the

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[9] It also ignored the fact that plaintiffs were free to sue Petitioners in India or in France, and that Petitioners could thus still be held responsible if they were found to have any liability for the crash.

abolition of sovereign immunity to claims with a substantial connection with the United States. *Verlinden*, *supra*, at 490. By deciding that Petitioners should not be immune *without* considering whether Petitioners fell within one of the statutory exceptions, the Texas court has sanctioned the litigation in a small Texas town[10] of an air crash in India in which Petitioners' alleged acts had no connection whatsoever with the United States.[11] Furthermore, that litigation is proceeding in a forum, a state court in Texas, other than that which Congress specified as a proper venue if immunity were to be denied under the FSIA.[12]

3. The Decision of the Texas Court Improperly Penalizes the German Government's Decision on How to Structure Its Investment in Petitioner Airbus Industrie, and Injects U.S. Courts into Judging Truly Sovereign Decisions

It is undisputed that if the German governmental interests in Deutsche Airbus are counted, the governmental ownership of Petitioner Airbus would exceed 60% and Airbus would qualify as an instrumentality of a

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[10] Angleton is a rural town of approximately 6,000 located 35 miles southeast of Houston.

[11] The Texas trial court found that Petitioners' alleged acts had no direct effect in the United States. Plaintiffs did not appeal that finding. Appendix E-6 n.1.

[12] Under the FSIA, the only proper venue would be a Federal court either in the District of Columbia or in the District with the most significant effects of the alleged acts of Petitioners. None of the plaintiffs have any connection with Texas, so there could be no basis for a Texas venue under the FSIA.

foreign state under the FSIA. The Texas court's decision to deny Airbus status as an instrumentality of a foreign state is thus based not upon actual ownership, but upon the manner in which the German government entities chose to organize their participation in Airbus. The German governmental entities could have decided to set up two companies to be the German members in Airbus, rather than just one company as they did, with one 100% government owned with an 18.67% share in Airbus (49.25% of Germany's overall 37.9% interest in Airbus), and the second a privately-owned company with an 19.23% share in Airbus (50.75% of Germany's overall 37.9% interest in Airbus). Had the German government entities adopted that ownership structure, there would be absolutely no difference in the amount of money put up by the German governmental entities, or the risk they bear from the enterprise of Airbus, but Airbus would qualify as an instrumentality of a foreign state under the FSIA, because the German government ownership in the 100% government-owned company would count under the Texas court's rule.

How a government decides to set up its activities is, by definition, a purely sovereign decision, and one which Congress explicitly recognized in the FSIA that the courts of this country have no right to second guess. Yet the Texas court has done just that by telling the German government entities that sovereign immunity is not available because they chose one form of organization rather than another for their participation in Airbus. This intrusion into the sovereign affairs of the German governmental entities is unwarranted and improper, and completely contrary to the intent of the FSIA that such actions be absolutely immune in U.S. Courts.

4. The Texas Court's Decision is Inconsistent With Congress' Mandate to Decide Whether an Entity is an Instrumentality by Determining Its Percentage of Foreign State Ownership

The Texas court's decision is also clearly contrary to Congress' determination that whether an entity qualifies as an instrumentality of a foreign sovereign should be based solely upon the ownership of that entity, and that all that is required to qualify is simple majority ownership. Petitioners believe that ownership should be determined in the sense in which it is commonly understood, i.e. who put up the money for the enterprise, and who is entitled to share in its distributions and ultimate net profits. As the Fifth Circuit noted, there is no bar in the FSIA to calculating ownership based on equitable or beneficial ownership. *Linton, supra*, at 598 n.29.

Here, it is undisputed that foreign states put up over 60% of Petitioner Airbus' assets, were entitled to receive over 60% of the profits from Airbus' activities, and bore over 60% of the risks of loss from Airbus' activities. This is especially true given Airbus' status as a French GIE with no assets other than those of its member companies, and where the economic results of Airbus' activities flow directly to the member companies' books based solely upon their membership percentage in the GIE.[13] In that sense, Deutsche Airbus doesn't "own" 37.9% of Airbus, it *is* 37.9% of Airbus.

The Texas court rejected Petitioners' argument by simply refusing to accept that over 60% of the profits of Airbus would flow through to governmental entities.

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[13] See footnote 4, *supra*.

This refusal was based solely upon the fact that the German governmental entities would receive less than a majority of the share of profits that would flow through to Deutsche Airbus. Appendix E-25; 934 S.W.2d at 765. In doing so, the court completely ignored the percentage shares of the profits that would flow through to the French and Spanish governments.

The economic flaw in the Texas court's rule is perhaps best illustrated by applying it to two hypothetical entities. The first hypothetical entity, "Acme," is a 50/50 partnership between government A and company C. Company C is a 50/50 partnership between government B and a private investor. Although in this hypothetical a total of 75% of Acme is clearly directly owned by the two governments, A and B, under the Texas rule, the ownership of government B in company C would be completely disregarded because it is less than a majority of C. And because the ownership of government A was not a majority of Acme, Acme would not qualify as an instrumentality of a foreign state under the FSIA.

In the second hypothetical, the entity, "Ajax," is 50.01% owned by company A, and 49.99% by private investors. Company A is in turn 50.01% owned by company B, and 49.99% by private investors. Company B is in turn 50.01% owned by company C, and 49.99% by private investors. This pattern of ownership continues on upward through seven more layers of ownership (the tiers), until it reaches company "I", which is 50.01% owned by government Z and 49.99% owned by private investors. The only government ownership in any company in the tier of companies is Z's 50.01% of "I." "I" qualifies as an instrumentality because it is directly 50.01% owned by a government. Under the Texas rule (and also under the *Roselawn* rule), each entity in the

tier of subsidiaries of "I" would also qualify as an instrumentality because of its 50.01% ownership by a parent company that qualified as an entity. The ultimate result is that Ajax would qualify as an instrumentality, even though the total share of government investment in Ajax was less than 0.1% (one tenth of a percent) of the total investment in Ajax.

These results are clearly not what was intended by Congress when it adopted the FSIA, and indicate why ultimate ownership is the only test of ownership which comports with the results Congress intended.

CONCLUSION

The decision of the Texas court in this matter is clearly erroneous, and there is a serious and broad split of authority between the courts on a question of federal law with foreign relations implications. This Court should accordingly grant the writ.

DATED: December 22, 1998.

Respectfully Submitted,

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THE SUPREME COURT OF TEXAS
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October 1, 1998

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RE: Case Number 97-0086
Court of Appeals Number: 14-95-00371-CV
Trial Court Number: 92-C0375

Style: AIRBUS INDUSTRIE G.I.E. and
AEROFORMATION G.I.E. v.
LAURA HOWELL LINTON,
MR. and MRS. STAN MOSS, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Michael H. Kopp
Michael H. Kopp, Deputy

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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July 03, 1998

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RE: Case Number 97-0086
Court of Appeals Number: 14-95-00371-CV
Trial Court Number: 92-C0375

Style: AIRBUS INDUSTRIE G.I.E. and
AEROFORMATION G.I.E. v.
LAURA HOWELL LINTON,
MR. and MRS. STAN MOSS, ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied'. Motion to stay dismissed as moot.

Sincerely,

John T. Adams, Clerk

by /s/ Michael H. Kopp
Michael H. Kopp, Deputy

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 02
RE: Case No. 14-95-00371-CV

Official Business
State of Texas
State Penalty for
Private Use

Postmark Date
Jan 17 '97
Houston Texas

Style: Linton, Laura Howell, Et Al
v. Airbus Industrie and Aeroforamtion [sic]

Please be advised that on this date, the Court DENIED motion for en banc consideration in the above cause.

T.C. Case # 92-C0375

Mary Jane Smart, Clerk

Jacques E. Soiret
Kirtland & Packard
1900 Avenue of the Stars
Los Angeles, CA 90067

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 02
RE: Case No. 14-95-0031-CV

Official Business
State of Texas
State Penalty for
Private Use

Postmark Date
DEC 5 '96
Houston Texas

Style: Linton, Laura Howell, Et Al
v. Airbus Industrie and Aeroforamtion [sic]

Please be advised that, on this date, the Court OVERRULED appellees' motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, January 6, 1996.

T.C. Case # 92-C0375

Mary Jane Smart, Clerk

Jacques E. Soiret
Kirtland & Packard
1900 Avenue of the Stars
Los Angeles, CA 90067

SEPTEMBER 12, 1996

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

NO. 14-95-00371-CV

LAURA HOWELL LINTON, et al.,
Appellant
V.
AIRBUS INDUSTRIE and AEROFORMATION,
Appellees

This cause, an appeal from the judgment in favor of Airbus Industrie and Aeroformation signed February 9, 1995, came on to be heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore order the judgment of the court below REVERSED and REMAND the cause for proceedings in accordance with the court's opinion.

We order appellees, Airbus Industrie and Aeroformation, to pay all costs incurred because of this appeal.

We order this decision certified below for observance.

Reversed and Remanded and Opinion filed September 12, 1996.

In The
FOURTEENTH COURT OF APPEALS

NO. 14-95-00371-CV

LAURA HOWELL LINTON, et al.,
Appellants
V.
AIRBUS INDUSTRIE and AEROFORMATION,
Appellees

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 92-C0375

OPINION

This is an appeal from an order granting appellees' motion for special appearance and dismissing appellants' claims for lack of subject matter jurisdiction. The trial court found appellees to be immune from suit in the United States because they are foreign sovereigns under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602-11 (1989). We reverse and remand.

I. Background

This case arises from a suit brought by surviving family members of passengers killed in a crash of an Indian Airlines flight in Bangalore, India, in February of 1990. Two lawsuits were originally filed in state district court in Brazoria County, Texas, one by Laura Howell Linton, *et al.*, and the other by Mr. and Mrs. Stan Moss, *et al.* Appellants alleged various products liability and negligence theories of recovery against Airbus Industrie ("AI"), who designed, tested and assembled the aircraft, and Aeroformation ("AeF"), who trained the pilots (AI and AeF are hereinafter referred to collectively as "the Airbus defendants" or "appellees").

On March 13, 1992, the cases were removed to the United States District Court for the Southern District of Texas, Galveston Division, on the basis of diversity and foreign sovereign immunity. The court *sua sponte* consolidated the actions, and Linton and Moss filed a motion to remand their cases to state court. On April 13, 1992, the Airbus defendants filed motions to dismiss the cases arguing that, as an "agency or instrumentality of a foreign state" under the FSIA, they are entitled to absolute immunity from suit in the United States. On July 22, 1992, the federal district court held that the FSIA did not apply because the Airbus defendants are not agencies or instrumentalities of a foreign state. *Linton v. Airbus Industrie*, 794 F.Supp. 650, 653-54 (S. D. Tex. 1992) (hereinafter "*Linton I*"). The Airbus defendants appealed the court's decision, but the appeal was dismissed on the ground that the court's order was not a final, appealable order.

Finding it lacked subject matter jurisdiction, the federal district court remanded the case to state court, but stayed the remand order to allow the Airbus defendants to appeal the *Linton I* decision. The Airbus

defendants appealed the remand order, but the Fifth Circuit found it had no appellate jurisdiction over a remand order and dismissed the appeal. *See Linton v. Airbus Industrie*, 30 F.3d 592, 600 (5th Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 639 (1994)(hereinafter "*Linton II*"). The federal district court, in turn, remanded the case to the state district court in Brazoria County.

The Airbus defendants again filed a motion for special appearance arguing their immunity as agencies or instrumentalities of a foreign state under the FSIA. After a hearing on the motion, the trial court found appellees to be foreign sovereigns under § 1603(b)(2) of the FSIA and dismissed the case for want of jurisdiction.

II. Standard of Review

Appellants contend the Airbus defendants should have challenged the court's subject matter jurisdiction by filing a Rule 85 plea to the jurisdiction rather than a Rule 120a special appearance. Tex. R. Civ. P. 85, 120a. As a result, appellants argue, we must accept all of the allegations in appellants' petition as true and should review the trial court's findings of fact "without giving them the deference ordinarily anticipated in the resolution of fact issues." We disagree.

Challenges to the immunity of a foreign sovereign are commonly brought under Tex. R. Civ. P. 120a and have been upheld. *See, e.g., K.D.F. v. Rex*, 878 S.W.2d 589 (Tex. 1994); *United Mexican States v. Ashley*, 556 S.W.2d 784 (Tex. 1977). Moreover, appellants challenge only the legal assumptions underlying the trial court's fact findings, not their accuracy. Finally, even if the challenge should have been brought as a Rule 85 plea to the jurisdiction, appellants have failed to present any argument as to why such error would be reversible.

We reject appellants' argument that the Airbus defendants' special appearance was an improper procedure to challenge the trial court's jurisdiction.

An appellate court must review all of the evidence before the trial court on the question of jurisdiction raised in a special appearance. *Vosko v. Chase Manhattan Bank, N.A.*, 909 S.W.2d 95, 99 (Tex.App.—Houston [14th Dist.] 1995, writ denied); *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 632 (Tex.App.—Dallas 1993, writ denied). In the present case, the trial court made findings of fact and conclusions of law, which are binding upon the appellate court unless challenged on appeal. *Hotel Partners*, 847 S.W.2d at 632 (citing *Wade v. Anderson*, 602 S.W.2d 347, 349 (Tex.App.—Beaumont 1980, writ ref'd n.r.e.) and *Zelios v. City of Dallas*, 568 S.W.2d 173, 175 (Tex.App.—Dallas 1978, writ ref'd n.r.e.)). Appellants do not contest the accuracy of the trial court's findings of fact; rather, appellants challenge the legal assumptions underlying those findings. We may review the conclusions the trial court draws from or applies to the facts found to determine their correctness. *Hotel Partners*, 847 S.W.2d at 632 (citing *Mercer v. Bludworth*, 715 S.W.2d 693, 697 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)).

III. Points of Error One and Two

In their first point of error, appellants contend the trial court erred in dismissing their case for lack of subject matter jurisdiction because appellees are not agents or instrumentalities of a foreign state as defined in § 1603 (a) of the FSIA.

The FSIA is the exclusive basis of jurisdiction in federal and state courts for suits involving foreign

sovereigns. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433, 109 S.Ct. 683, 688 (1989). The Act provides that, subject to certain exceptions enumerated in the Act,[1] "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. A "foreign state" is defined in the Act to include an "agency or instrumentality of a foreign state." 28 U.S.C. § 1603 (a). An "agency or instrumentality of a foreign state" is defined as follows:

> (b) An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or *a majority of whose shares or other ownership interest is owned by a foreign state* or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (b)(emphasis added). This appeal concerns interpretation of the second requirement of § 1603 (b), specifically, whether or not a majority of appellees' shares or other ownership interest is owned by a foreign state.

Airbus Industrie (AI) and Aeroformation (AeF) are separate French legal entities known as Groupement d'Interet Economique, and are organized pursuant to treaties between the governments of France, Germany

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[1] The trial court found that none of the exceptions contained in the Act apply. Appellants have not challenged this finding on appeal.

and Spain. Because AI owns 90% of AeF, we will first exmine AI's ownership structure.

AI is owned by four corporations, none of which holds a majority interest. Two of these corporations, Aerospatiale (owned 99% by the French Republic) and CASA (owned 83% by the Spanish State) are controlled by foreign states and together own 41.9% of AI. British Aerospace is privately held and owns 20% of AI. The remaining 37.9% of AI is owned by Deutsche Airbus GmbH ("DA") and is the focus of the present dispute. DA is 50.75% privately owned. The remaining 49.25% ownership is divided between the Republic of Germany (20%), the State of Bavaria (13.46%), the City of Hamburg (10.19%), and the City of Bremen (5.59%).

Because 50.75% of DA's shares are privately owned, appellants argue that it cannot be considered an agency or instrumentality of a foreign state. Therefore, appellants contend, DA's 49.25% sovereign ownership may not be "tiered" through the company and "pooled" with the sovereign ownership interests of France and Spain to qualify for FSIA immunity. Appellees, on the other hand, argue that the relevant inquiry is the total amount of shares ultimately owned by foreign states, not whether the entities contributing ownership interests to be pooled together are themselves foreign states. The Fifth Circuit succinctly defined the issue before us as follows: "whether through 'tiering' a foreign state's ownership interest can be attributed when that foreign state did not own a majority interest in the company that held the ownership interest in Airbus." *Linton II* at 597 n. 28.

A. Pooling

Appellants claim the plain language of the FSIA indicates that "foreign state" status is conferred only

where a majority interest in the entity in question is owned by a single foreign state, not a number of foreign states. In other words, pooling should not be allowed when no single foreign state owns more than 50% of the entity. Appellants' argument finds some support in the federal district court's opinion in *Linton I*. The federal court focused on the literal wording of the statute, which "speaks only of entities 50% or more of whose shares are owned by a foreign state, singular." *Id.* at 652. Had Congress intended to permit pooling, the court reasoned, "it could have easily defined a foreign state as an entity 50% or more of whose shares are owned by a foreign state or states." *Id.*

In *Linton II*, the Fifth Circuit noted that the district court's reasoning should be examined in light of the rules of statutory construction. *Linton II*, 30 F.2d at 598 n.28. The court cited 1 U.S.C. § 1, which provides that "words importing the singular include and apply to several persons, parties, or things" unless the context indicates otherwise. *Id.* The Fifth Circuit also cited several authorities that had approved of pooling in such a situation. *Id.* (citing *Le Donne v. Gulf Air, Inc.*, 700 F.Supp. 1400, 1405-06 (E. D. Va. 1988); *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F.Supp. 553, 568-69 (C.D.Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036 (1982); *Rios v. Marshall*, 530 F.Supp. 351, 371 (S.D.N.Y. 1981)). More recently, in *In Re Aircrash Disaster Near Roselawn, Indiana*, 909 F.Supp. 1083, 1093 (N.D. Ill. 1995) (hereinafter "*Roselawn*"), the court specifically found that 1 U.S.C. § 1 "permits reading § 1603(b)(2) as referring to majority ownership by 'foreign states' rather than simply 'a foreign state.' "

Despite its general skepticism regarding the concept of pooling, the federal district court in *Linton I*

recognized that "every court that has considered the issue has approved this type of pooling." *Linton I* at 651. Acknowledging these authorities, the court stated:

> FSIA would unquestionably apply if any owner were a party or if more than 50% of the entity in question were owned by any single foreign state. It is not, therefore, too much of a stretch to assume that Congress intended FSIA to apply to an entity owned by several foreign states, even if no single foreign states [sic] owns a majority; a majority of the entity's stock or other ownership interest is still owned by foreign states to which Congress clearly intended FSIA to apply.

Id. at 652-53.

Like appellants in the present case, the plaintiffs in *LeDonne v. Gulf Air, Inc.*, 700 F.Supp. 1400 (E.D.Va. 1988) argued that the FSIA does not apply unless a majority ownership vests in a single foreign state. Rejecting the plaintiffs' position, the federal district court stated:

> This is an unnecessary literalism that runs counter to the Act's purpose and ignores the well-established international practice of states acting jointly through treaty-created entities for public or sovereign purposes. If the policies that animate the FSIA are to be given their full range, it must, therefore, apply to treaty-created instrumentalities jointly owned by foreign states.

Id. at 1406. Similarly, in *Roselawn*, the district court held "[t]here is simply no sound policy justification for reading the FSIA to apply to an entity majority owned by one foreign state but not to apply to an entity

majority owned by two or more foreign states." *Roselawn*, 909 F.Supp. at 1093.

We see no reason to deviate from this well-reasoned principle. A majority of courts examining the issue have held that foreign states may pool their interests for purposes of meeting the § 1603 (b)(2) majority ownership requirement. *See, e.g., Mangattu v. M/V IBN HAYYAN*, 35 F.3d 205, 207-08 (5th Cir. 1994) (holding foreign states can pool their ownership interests for purposes of meeting § 1603(b)(2)); *LeDonne*, 700 F.Supp. at 1406 (holding pooling allowed where corporation owned equally by four nations);[2] *see also Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 530-31 (S.D.Tex. 1994); *Aluminum Distributors, Inc. v. Gulf Aluminum Rolling Mill Co.*, 1989 WL 64174 (N.D. Ill. 1989). We therefore find that the pooling of ownership interests between foreign sovereigns where no single state owns more than 50% is acceptable under the FSIA.

B. Tiering

1. Tiering through majority-owned intermediaries.

Appellants argue that, even if pooling is allowed under the FSIA, AI is not a foreign sovereign because "no foreign nation directly owns any portion of [AI]." Appellants' argument is based on the fact that France, Spain and Germany do not hold direct ownership

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[2] Those cases, like the instant case, all involve entities which were created by treaty or were a multi-national joint venture. "In such circumstances, there are sufficient indicia that sovereign states are jointly acting in their sovereign capacities through the entity and that the entity should therefore qualify as a sovereign state." *Gardiner Stone Hunter v. Iberia Lineas Aereas*, 896 F.Supp. 125 (S.D.N.Y. 1995).

interests in AI; rather, their ownership is held through various intermediate corporate entities. The issue is whether France, Spain and Germany may "tier" their ownership interests through the corporate intermediaries Aerospatiale (owned 99% by the French government), CASA (owned 83% by the Spanish government), and Deutsche Airbus GmbH (DA) (owned 49.25% by the Republic of Germany, the State of Bavaria, and the cities of Hamburg and Bremen).

Appellants argue that if the majority of a corporate entity's stock is owned by "an agency or instrumentality of a foreign state," it is not owned by a "foreign state or political subdivision thereof" as defined by the FSIA. If Congress had intended otherwise, appellants reason, the statute would have defined an "agency or instrumentality of a foreign state" as an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof *or an agency or instrumentality of a foreign state.*" This very issue was recently analyzed by two courts with conflicting results. *See Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir), *cert. denied*, __ U.S. __, 116 S.Ct. 187 (1995) and *Roselawn*, 909 F.Supp. at 1093-1097.

In *Gates*, the Ninth Circuit determined that tiering was not permissible under the FSIA for the same reasons urged by appellants. *Gates*, 54 F.3d at 1462. The court observed: "the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it is *defined as* an agency or instrumentality." 54 F.3d at 1462 (emphasis in original). The court also determined that a "foreign state" could not be equated with an "agency or instrumentality of a foreign state" because:

> If Congress had intended 'agencies or instrumentalities of a foreign state' to mean 'a foreign state' for the purposes of section 1603,

> then it also would have intended a 'political subdivision' to mean 'a foreign state' because section 1603(a) defines a foreign state as including both 'a political subdivision of a foreign state or an agency or instrumentality of a foreign state.' The statutory language strongly indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between 'foreign states' and 'political subdivisions thereof.'
>
> For example, section 1603(b)(2) provides that the entity must be 'an organ of a foreign state *or political subdivision thereof*,' or a majority of its shares must be owned by a 'foreign state *or political subdivision thereof*.'

54 F.3d at 1462 (emphasis in original). The court emphasized the House Report's distinction between foreign states and political subdivisions thereof and concluded:

> Congress seemed exceedingly conscious of the distinction between foreign states, political subivisions, and agencies or instrumentalities of foreign states and political subdivisions. It could easily have stated that an entity must be owned by a foreign state, a political subdivision *or an agency or instrumentality* of a foreign state or political subdivision. It did not.

Id. (emphasis in original). The *Gates* court disallowed "tiering" of a foreign state's ownership interest through corporate intermediaries, and held that an entity wholly owned by "an agency or instrumentality of a foreign state" is not owned by "a foreign state or political subdivision thereof." *Id.* at 1462. Appellants also cite *Gardiner Stone Hunter International v. Iberia Lineas Aereas de Espana, S.A., et al.*, 896 F.Supp. 125 (S.D.N.Y. 1995), which followed the Gates decision.

Faced with the identical issue, the Northern District of Illinois sharply disagreed with the *Gates* statutory analysis. *Roselawn*, 909 F.Supp. at 1093-1097. The court questioned the *Gates* observation that "the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it *is defined* as an agency or instrumentality." *Id.* at 1094-95. Finding use of the word "includes" to be "of very little import," the court observed that § 1603 provides "Definitions" of terms used in the FSIA. *Id.* at 1095. Noting that the legislative history indicates "Subsection (a) *defines* the term foreign state *as used in all provisions* of [the Act] . . . ," the *Roselawn* court concluded that "[t]he plain meaning of this definitional provision, as informed by its legislative history, is that where the term foreign state occurs in the Act it is to be read as including agencies and instrumentalities of the foreign state." *Id.* (emphasis in original)(citing H.R. Rep. No. 1487, 94th Cong. 2d Sess. 15 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6613)(hereinafter the "HOUSE REPORT")).

Next, *Roselawn* found that the *Gates* distinction between foreign states and political subdivisions "flies in the face of both the plain language of § 1603(a) as well as the House Report's analysis of § 1603(a)."[3] *Roselawn*, 909 F.Supp. at 1095. Considering the

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[3] In the House Report's analysis of § 1603(a), the House Judiciary Committee observed:

> Subsection (a) defines the term foreign state as used in all provisions of chapter 97 [the "Jurisdictional Immunities of Foreign States" chapter of the United States Code], except section 1608. In section 1608, the term 'foreign state' refers only to the sovereign state itself.

H.R.REP. NO. 1487, 94th Cong., 2d Sess. 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613.

legislative intent, the *Roselawn* court stated:

> . . . [i]n view of Congress' clear statement that § 1603's definition of foreign state applies 'except as used in section 1608,' we find it inconceivable that Congress intended to nullify that definition in the section immediately following it through the roundabout method of including a reference to political subdivisions and inviting the reader to rely on the canon of statutory construction *expressio unis est exclusio alterius* ('Expression of one thing is the exclusion of another').
>
> Rather, we conclude that the term foreign state as used in § 1603(b)(2) includes the agencies or instrumentalities of a foreign state. Although it is less than clear, we surmise that Congress included the superfluous reference to a 'political subdivision' in § 1603 (b)(2) for emphasis rather than to alter the definition of the term foreign state and that Congress omitted explicit (and equally superfluous) reference to agencies or instrumentalities in § 1603(b)(2) because it would render the definition of 'agency or instrumentality of a foreign state' circular — defining the term by way of referring to the term. Thus, while the *Gates* court was certainly correct that Congress 'could easily have stated that [in order to be deemed an agency or instrumentality of a foreign state] an entity must be owned by a foreign state, a political subdivision *or an agency or instrumentality* of a foreign state or political subdivision,' *Gates*, 54 F.3d at 1462, to do so would have introduced an unnecessary circularity into the statute.

Id. at 1096. The *Roselawn* court emphasized that, "until

very recently, courts have uniformly considered majority state-owned corporations to be agencies or instrumentalities of foreign states for FSIA purposes even where the state ownership was only indirect." *Id.* at 1093.[4]

The *Roselawn* court concluded that an entity directly majority-owned by a foreign state is an agency or instrumentality of a foreign state and, under § 1603(a), is also a foreign state:

> This Court's reading of § 1603(b)(2) in conjunction with § 1603(a) leads to the conclusion that *so long as the corporate intermediaries standing between a foreign state and a defendant*

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[4] The *Roselawn* court relied on the following authorities: *Delgado v. Shell Oil Co.*, 890 F.Supp. 1315, 1318 n.5 (S.D.Tex. 1995) (finding Dead Sea Bromine Co., Ltd. to be an agency or instrumentality of Israel even though Israel owned a majority of its shares indirectly: "[t]he fact that Israel's ownership interest in Dead Sea is 'indirect' because Dead Sea is a wholly owned subsidiary of an entity in which Israel owns an indirect majority interest is immaterial."); *Talbot v. Saipem A.G.*, 835 F.Supp. 352, 353 n.2 (S.D.Tex. 1993)(finding defendant Saipem S.p.A. to be a foreign state where it was owned indirectly (third-tier) by Italy's Ministry of Treasury through a chain of intermediary corporations and noting "[t]hat Saipem's ownership by the Italian government is indirect is immaterial"); *Trump Taj Mahal Assocs. v. Costruzioni Aeronautiche Giovanni Agusta S.p.A.*, 761 F.Supp. 1143, 1150 (D.N.J. 1991)(finding defendant Augusta S.p.A. to be a foreign state under § 1603(b)(2) despite the fact that its link to the Italian government was "triple-tiered"), *aff'd without opinion*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826, 113 S.Ct. 84 (1992); *Rutkowski v. Occidental Chem. Corp.*, 1988 WL 107342 (N.D.Ill. 1988)(finding defendant Asbestos Corp. Ltd. ("ACL") to be a foreign state under §1603(b)(2) despite the fact that Quebec's ownership of ACL was tiered through two other corporations); *cf. Credit Lyonnais v. Getty Square Assocs.*, 876 F.Supp. 517 (S.D.N.Y. 1995)(applying § 1603(b)(2) in the context of 28 U.S.C. § 1332(a)(4) and permitting the pooling of direct French ownership interests in defendant deriving through an intermediary corporation)).

> *seeking to invoke foreign state status are themselves majority owned by a statutorily-defined 'foreign state'* (which, to be explicit, includes an agency or instrumentality of a foreign state), such tiering of ownership interests will not deprive the defendant of foreign state status.

Roselawn, 909 F.Supp. at 1094 (emphasis added). The *Roselawn* court also rejected an argument similar to that made by appellants in this case when it held that

> . . . permitting pooling does nothing to 'remove' or 'distance' the foreign state from the entity. The ownership interests in the entity are no more remote whether the entity is owned by one foreign state or several. It is only tiering that permits the ownership interests of the foreign sovereign to become, in some sense, remote. However, as we have seen, this possibility derives from the language of the Act and we have neither the authority nor the inclination to rework the statute.

Id.

Although the wording of the FSIA has often been criticized as vague,[5] we find the *Roselawn* court's

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[5] *Roselawn*, 909 F.Supp. at 1088 (citing *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*, 730 F.2d 195, 205 (5th Cir. 1984)("The FSIA presents a peculiarly twisted exercise in statutory construction."); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 302 (2d Cir. 1981)(referring to the FSIA as a "vaguely worded statute"), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012 (1982); *Gibbons v. Udaras na Gaeltachta*, 549 F.Supp. 1094, 1106-05 (S.D.N.Y. 1982) (referring to the FSIA as "remarkably obtuse" and "a six-year-old labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial

(continued)

statutory analysis persuasive. Absent an expression of Congressional intent to the contrary, we can perceive no policy reason why tiering through an intermediary majority owned by a foreign state should not be permitted under the FSIA. We therefore hold that tiering through a majority owned intermediary is permissible to determine whether an entity is entitled to foreign state status under the FSIA.

2. Tiering through non-majority owned intermediaries

While the *Roselawn* court's analysis is instructive, it does not directly address the issue presented in this appeal: whether tiering should be allowed where the corporate intermediary is not majority owned by a foreign state. On this question our only authority is the *Linton* case itself.

In *Linton I*, the federal district court determined that the FSIA does not apply to AI because one of the pooling entities, DA, is not a foreign state. *Linton I*, 794 F.Supp. at 652. In order for the FSIA to apply, the 49.25% German interest has to be counted; however, the German ownership interest is held through DA, which is 50.75% privately owned and therefore not itself an agency or instrumentality of a foreign state. Because DA is not an agency or instrumentality of a foreign state, the court reasoned, Germany's interest may not be tiered through the corporate intermediary and pooled with the interests of France and Spain. *Id.* The federal district court rejected appellees' argument that it need not

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(fn. continued)
boon for the private bar but a constant bane of the federal judiciary.")).

consider whether the entities contributing ownership interests to be pooled are themselves foreign states:

> The notion that FSIA applies under these circumstances is inconsistent with the statute's text and purpose. By defining 'foreign state' as an entity 50% or more of whose shares are owned by a foreign state, Congress clearly indicated its intention that FSIA apply only to those entities wherein a majority interest is owned by a foreign state. To accept the Airbus Defendants' arguments would severely eviscerate the 50% requirement. Quite simply, and in direct contradiction to the statute's plain language, FSIA would apply to numerous entities even though less than 50% of their shares were owned by a 'foreign state' *as Congress has chosen to define that term.* The Court finds nothing to indicate that Congress intended that FSIA be so applied. No court has ever approved such an application, and the Court, in the absence of any Congressional directive whatsoever, declines to craft a new rule that would substantially broaden the reach of FSIA.

Linton, 794 F.Supp. at 653 (footnotes omitted)(emphasis in original).

In *Linton II* the Fifth Circuit rejected the Airbus defendants' appeal on procedural grounds, but stated in dicta:

> . . . [t]he Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity. . . . The controlling statute . . . erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming*

> *immunity* — not its parent — have 'a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof.' 28 U.S.C. § 1603(b)(2). There is no mention of 'voting' or 'control' majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

Linton, 30 F.3d at 598 n. 28 (emphasis in original). Thus, the Fifth Circuit superficially appeared to disagree with the decision in *Linton I*.

Although in *Linton II* the Fifth Circuit observed, without addressing the issue, that "equitable or beneficial majority ownership" is not expressly *prohibited* from consideration, neither does the FSIA expressly *allow* consideration of such ownership. In fact, the House Report provides no insight whatsoever into the congressional intent behind the majority ownership language contained in § 1603(b)(2).

Appellees urge the application of an ultimate ownership test, arguing that Congress placed in the FSIA no requirement that a foreign government arrange its corporate structures in a particular manner to qualify for immunity. Appellees conclude "the only logical standard is whether the majority of the ownership interest in the entity seeking FSIA protection would ultimately be distributed to foreign states upon dissolution." Ultimate ownership, appellees argue, "presents the only workable standard within the language of the FSIA that would not lead to arbitrary and uneven applications of the FSIA." In support of their argument appellees cite: (1) the general proposition that the FSIA should be broadly construed; (2) the language of the statute itself; (3) case law which they believe favors their position; and (4) an illustration of appellants' anti-tiering position which purportedly leads to an absurd result.

The Airbus defendants argue that FSIA should be broadly construed, citing as authority *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 499 U.S. 962, 111 S.Ct. 1587 (1991). *Nolan*, however, did not address § 1603(b)(2); rather, it discussed the legislative history supporting a broad interpretation of § 1441(d), which allows *removal* of actions by foreign states. *Id.* at 1065. The legislative history supports a broad application of the removal provision as assuring the availability of a federal forum to promote procedural and substantive uniformity in the treatment of foreign sovereigns. *Id.* We have found no concomitant authority for the proposition that a broad interpretation of § 1603(b)(2) in favor of tiering and pooling through non-majority owned intermediaries would promote any underlying purpose of the FSIA.[6]

Appellees next point to the definition of an agency or instrumentality of a foreign state, which includes an entity "a majority of whose shares *or other ownership interest* is owned by a foreign state." § 1603 (b)(2)(emphasis added). Citing the Fifth Circuit's statement in *Linton II* that "equitable or beneficial majority ownership is not expressly prohibited from serving," appellees claim that their theory of ultimate ownership is supported by the statutory language. However, a review of the legislative history lends no support to this argument.

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[6] In *Delgado v. Shell Oil Co.*, 890 F.Supp. 1315, 1319 (S.D.Tex. 1995), the court stated:

> [While the FSIA's] legislative history evinces Congress' intent that the definition of 'agency or instrumentality of a foreign state' be read broadly to encompass 'a variety of forms, . . .' there is no suggestion that a foreign state's system of property ownership, without more, should be determinative on the question whether an entity operating within the state is a state agency or instrumentality under the [FSIA].

In discussing the majority ownership requirement, the House Report provides:

> Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (*shares of stock or otherwise*) is owned by a foreign state or by a foreign state's political subdivision.

House Report at 6614 (emphasis added). It appears the "other ownership interest" language was meant to apply to other indicia of ownership where the entity in question is something other than a corporation with shares of stock. We find nothing in the legislative history to indicate the statutory language was meant to encompass ultimate ownership of stock held through non-majority owned intermediaries.

Appellees, citing *Wilk v. Creditanstalt Bankverein Int'l*, 1993 WL 97259 (S.D.N.Y. 1993) and *Communications Assocs., Inc. v. Novatel Comunications, Inc.*, 1985 WL 2542 (N.D.Ill. 1985), urge us to consider the manner in which the foreign sovereign interest in AI and AeF is held in deciding whether to apply the ultimate ownership test. Specifically, AI and AeF were both organized pursuant to treaties between the governments of France, Germany and Spain. Certain responsibilities were controlled by the Intergovernmental Committee, and the French Government agreed to provide whatever administrative services were required. The governments of France and Germany, acting through the Intergovernmental Committee, exercised control and direction of the aircraft development program. However, the status of AI and AeF as agencies or instrumentalities of a foreign state is not determined by a subjective control test. The statute speaks strictly in terms of majority ownership, and we will limit our inquiry to majority ownership as

dictated by the statute. *Delgado v. Shell Oil Co.*, 890 F.Supp. at 1318-19.

Appellees provide a hypothetical illustration purporting to show that failure to apply an ultimate ownership test will lead to "arbitrary and uneven applications of the FSIA." Under the hypothetical presented, France owns 49.99% of Corporation A directly. The remaining 50.01% is owned by Entity B, which is owned 49.99% by Germany and 50.01% by a second-tier intermediary, Entity C. Entity C in turn is owned 49.99% by Germany and 50.01% by Entity D. Germany owns 49.99% of Entity D. As a result, France and Germany ultimately own 93.74% of Corporation A. Appellees claim it would be possible to construct an entity 99.98% owned by foreign countries that would not qualify as an agency or instrumentality of a foreign state under appellants' "anti-tiering" reasoning.[7]

Regardless of the merits of the Airbus defendants' hypothetical, we must leave those concerns to the legislative and executive branches of our government, and be directed by Congress' plain language and intent. *See Roselawn*, 909 F.Supp. at 1096.

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[7] We find it interesting that the court in *Linton I* constructed what it considered to be an equally dubious scenario applying the Airbus defendants' ultimate ownership test. The court hypothesized that Entity B is wholly owned by Entity A. Entity A is owned 48% by a foreign state. Under this hypothetical, it is clear the FSIA does not apply to either Entity A or Entity B. However, under the Airbus defendants' approach, if Entity A sells 5% of the shares of Entity B to Entity C, which is entirely owned by a foreign state, FSIA applies to Entity B even though 95% of the shares of Entity B are privately owned by entities explicitly excluded from the protections of the FSIA. "That more than 50% of the total ownership of Corporation B is controlled by one foreign state or another does not negate the fact less than 5% of Entity B's shares are actually owned by a foreign state." *Linton I*, 794 F.Supp. at 653.

In analyzing the issue presented, the legislative framework of the FSIA is instructive. The FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states or their instrumentalities. *See, e.g., De Letelier v. Republic of Chile*, 748 F.2d 790, 793 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S.Ct. 2656 (1985). At the hearings on the bill it was pointed out that American citizens "are increasingly coming into contact with foreign states and entities owned by foreign states," calling into question "whether our citizens will have access to the courts in order to resolve ordinary legal disputes." HOUSE REPORT at 6605. The bill was considered "urgently needed" in a modern world "where foreign state enterprises are every day participants in commercial activities . . . ." *Id.*

The first expressed objective of the FSIA was to codify the so-called "restrictive" principle of sovereign immunity to bring the United States into alignment with international law:

> Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle . . . is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Id. Although the restrictive principle denies immunity to foreign states in suits based on commercial acts, § 1603 (b)(2) in effect creates a *presumption* that any entity majority owned by a foreign state is engaged in sovereign activity.[8] *See Joseph v. Office of Consulate Gen.*

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[8] Section 1603(b) has been criticized in this regard for being out of line with international practice: "[n]o country in the world has adopted state ownership as a basis for conferring sovereign legal

(continued)

of Nig., 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077 (1988); *Meadows v. Dominican Rep.*, 817 F.2d 517, 522 (9th Cir.), *cert. denied*, 484 U.S. 76, 108 S.Ct. 487 (1987); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 824 (9th Cir.), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2483 (1987). This presumption, however, runs contrary to the realities of the modern public commercial sector, which has become so widely diversified as a result of the trend toward privatization of state-owned industries and general economic globalization that "one may safely say that *most* state-owned corporations are engaged in commercial activities." William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes*?, 65 TUL. L. REV. 535, 566-67 (1991) (hereinafter "Hoffman")(emphasis in original). Moreover, this presumption is directly contrary to the internationally recognized rule which presumes that foreign state owned entities with separate legal personalities generally are not entitled to assert sovereign immunity.[9] *Id.* at 540.

(fn. continued)
status on commercial corporations." William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes*?, 65 TUL. L. REV. 535, 565 (1991).

[9] We find it interesting to note that France and Germany, two of the foreign states attempting to pool their ownership interests in the present case, each apply the "separate entity rule" which presumes nonimmunity and, consistent with the restrictive theory, is subject to an exception conferring immunity for sovereign acts. Hoffman, 65 TUL. L. REV. at 561. Thus, it would appear that the United States would not be entitled to foreign state status in those countries under the facts presented in this appeal.

By enacting § 1603(b)(2), Congress opted for a simple majority ownership rule. However, there is no indication in the legislative history that it thereby intended to abandon the restrictive principle and broaden the scope of foreign state immunity. Section 1603(b)(2) defines an agency or instrumentality of a foreign state as an entity "a majority *of whose shares*" is owned by a foreign state. § 1603(b)(2)(emphasis added). AI's shares are directly owned by Aerospatiale, CASA, British Aerospace and DA. Appellees' ultimate ownership test would require us to ignore this level of ownership altogether even though the statute expressly provides otherwise. If DA itself were a party to this action it would not be entitled to FSIA immunity as a foreign state because a majority of its shares are privately held. Moreover, because a majority of DA's shares are privately held, we are unable to conclude that the majority of the ownership interest in AI would "ultimately be distributed to foreign states upon dissolution," which is the focus of the ultimate ownership test urged by appellees. We find it incongruous with the language and purpose of the Act to allow *minority* foreign state ownership in a *privately owned* entity to be tiered and pooled to achieve foreign state status under the FSIA.

The *Roselawn* court's analysis supports this conclusion. Applying that analysis to the present case reveals the following:

> Under § 1603(b)(2), if [DA] is directly majority-owned by a foreign state it constitutes 'an agency or instrumentality of a foreign state,' and therefore, under § 1603(a), it is a 'foreign state.' If [DA], in turn, owns the majority of shares of [AI], [AI] is, by definition, both owned by a foreign state [§ 1603(a)] and is a foreign state [§ 1603(b)(2)].

Roselawn, 909 F.Supp. at 1094. The *Roselawn* court concluded that tiering of ownership interests will not deprive the defendant of foreign state status "so long as the corporate intermediaries standing between a foreign state and a defendant seeking to invoke foreign state status are themselves majority owned by a statutorily-defined 'foreign state.' " *Id.*

Pooling allows the FSIA to apply to an entity "majority owned by two or more foreign states." *See, e.g., Roselawn*, 909 F.Supp. at 1093; *LeDonne*, 700 F.Supp. at 1406. In other words, *foreign states* may pool their ownership interests for purposes of meeting § 1603(b)(2). Tiering recognizes the legislative purpose to disregard the actual corporate form and concentrate on foreign state ownership. In other words, the fact that a state might choose to double or triple tier its ownership does not disturb the entity's "foreign state link." *Trump Taj Mahal*, 761 F.Supp. at 1150. Thus, foreign state majority ownership has consistently been recognized as the necessary link at each level. Ignoring this critical link and applying an ultimate ownership test does not comport with the plain language of the statute, the legislative history or case law.

We hold that foreign state ownership interests in AI derived through DA may not be tiered and pooled with other foreign state ownership interests in AI because DA is not majority owned by a foreign state. As a result, AI is not a foreign state for purposes of the FSIA.

We must now determine whether AeF qualifies for foreign state status under the FSIA. During the relevant time period, AeF was 90% owned by AI and 10% owned by Flight Safety International, Inc., which is not a governmental agency or instrumentality. Disregarding Germany's minority interest in DA, we have concluded that AI does not qualify for foreign state status because only 42% of its shares are owned by foreign states or

their agencies or instrumentalities. For the same reasons we have found that AI is not an agency or instrumentality of a foreign state, we find that AeF does not qualify for foreign state status for purposes of the FSIA. Point of error number one is sustained. Because we hold that appellees are not foreign states for purposes of the FSIA, it is unnecessary to address point of error number two.

The order of the trial court is reversed and this cause is remanded to the trial court for further proceedings in accordance with this opinion.

/s/ Harriet O'Neill
Justice

Judgment rendered and Opinion filed
September 12, 1996.

Panel consists of Justices Yates, Draughn,
and O'Neill.[10]

Publish — TEX. R. App. P. 90.

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[10] The Honorable Joe L. Draughn sitting by assignment.

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NO. 92-C-0375
92 C 0404

FILED
FEB 9, 1995
Jerry Deere
Clerk of District Court
Brazoria Co. Texas
By _____Deputy

IN THE DISTRICT COURT OF
BRAZORIA COUNTY, TEXAS
23RD JUDICIAL DISTRICT

LAURA HOWELL LINTON, ET AL.,
PLAINTIFFS,
VS.
AIRBUS INDUSTRIE, ET AL.,
DEFENDANTS.

ORDER ON SPECIAL APPEARANCE

On February 9, 1995, came on to be heard Defendants Airbus Industrie and Aeroformation's Special Appearance to Present Motion Objecting to the Jurisdiction, and after hearing the arguments of counsel, reviewing the pleadings, moving papers, responses, and evidence properly submitted in support of the motion, the Court finds that the motion is meritorious and should be granted. It is therefore

ORDERED, ADJUDGED, and DECREED that Defendants Airbus Industrie and Aeroformation are foreign states under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602, *et seq.*, and that no exceptions to the FSIA apply; therefore, Defendants Airbus Industrie and Aeroformation are absolutely immune from suit in the United States.

It is further ORDERED, ADJUDGED, and DECREED that this case is dismissed for lack of subject matter jurisdiction over Airbus Industries and Aeroformation.

SIGNED this 9th day of February, 1995

/s/ J. Ray Gayle
Presiding Judge

ORDER No. 67-821 OF THE 23RD SEPTEMBER 1967
on economic interest groups (G.I.E.) [amended]
(Official Journal, 28th September 1967, p. 9537)

First Clause (*law n° 89-377 of 13th June 1989. cl.14*) - Two or more physical persons or bodies corporate may set up an economic interest group between them for a fixed term.

The purpose of the group is to facilitate or to develop the economic activity of its members, of improving or increasing the results of this activity; it is not that of realising profits for itself.

Its activity must be linked to the economic activity of its members and cannot have a subsidiary character with regard to this.

First clause - 1 (*law n° 89-377 of 13th June 1989. cl. 15*) - Persons carrying out a profession which is subject to a particular legal or regulatory status or whose position is protected may constitute an economic interest group or take part therein.

Cl. 2 (*law n° 89-377 of 13th June 1989. cl. 16*) An economic interest group may be constituted without any capital.

(*Order n° 67-821 of the 23rd September 1967*) The rights of its members may not be represnted by negotiable instruments. Any clause tot he contrary shall be deemed not to be written.

Cl.3 - An economic interest grouping enjoys corporate status and has full ability to date its registration at the company and commercial registry without this registration implying a commercial nature for the grouping. (*law n° 89-377 of 13th June 1989. cl. 17*) An economic interest group whose purpose is commercial may make any commercial actions habitually and as its main activity. It may hold a commercial lease.

(*law n° 89-377 of 13th June 1989. cl. 18*) The persons who have acted on behalf of an economic interest group which is in the process of formation before it has acquired enjoyment of corporate status shall be held responsible, jointly severally and indefinitely for any deeds thus made, unless the group, after having been correctly constituted and registered, takes up the undertakings made. Such undertakings shall then be deemed to have been made by the group from their origin.

Cl.3-1 (*law n° 89-377 of 13th June 1989. cl.19*). An economic interest group, together with its deeds and resolutions may only be null and void if the imperative terms of the present order are violated, or if one of the general causes of nullity of contracts should arise.

Any action in nullity shall be extinguished when the cause of nullity ceases to exist on the day in which the court shall judge on the facts in the first instance, save if this nullity is based on the illegality of the purposes of the group.

Clauses 1844-12 to 1844-17 of the Civil Code shall be applicable to economic interest groups.

Cl.4 - Members of a group shall be held liable for the debts of the latter against their own assets; (*Law n° 89-377 of 13th June 1989, cl.20*) nevertheless a new member may, if the contracts so allows, be exonerated from any debts arising prior to his entry into the group. The decision to exonerate must be published. (*Order n° 67-821 of the 23rd September 1967*). Save for any agreement to the contrary with a third contracting party, partners shall be jointly and severally liable.

(*Order n° 67-821 of the 23rd September 1967*) Creditors of the group may only pursue the payment of debts against a member after having notified the group by an unregistered deed in vain.

Cl. 5 - An economic interest group may issue stocks, under the general conditions for the issue of such instruments if it is exclusively composed of companies which satisfy the

conditions as set out in the law n° 66-537 of the 24th July 1966 on commercial companies for the issue of stocks.

(Law n° 85-698 of the 11th July 1985, clause 15) An economic interest group may also issue stocks, under the general conditions for the issue of such instruments as set out in the law n° 85-698 of the 11th July 1985 authorising the issue of paper instruments by certain associations if it is itself made up exclusively of associations which meet the conditions set out by this law for the issue of stocks.

Cl. 6 - The economic interest group contract shall determine the organization of the group, subject to the provisions of the present order. It shall be set out in writing and published according to the terms set out by decree.

It shall in particular contain the following indications:
1. The name of the group;
2. The name, trading name or corporate name, legal form, address of domicile or registered office and, if appropriate, the registration number at the commercial (*and company*) registry or in the trades register, of each of the group members;
3. The duration for which the group is constituted;
4. The purpose of the group;
5. The address of the group's registered office.

Any changes in the contract shall be drawn up and published in the same conditions as the contract itself. They may only be enforceable against third parties from the date of this publication.

Cl.7. - The group, during the course of its existence, may accept new members under the terms set up by the contract which constitutes it.

Any member of the group may withdraw under the conditions set out in the contract, on condition that he has carried out his obligations.

Cl. 8 - A meeting of the members of the group is authorised to take any decisions, including one to liquidate early, or to extend, according to the conditions set out in the contract. The latter may require that all decisions of certain of them must be taken in terms of quorum and with a majority which it sets out; if the contract is silent, decisions must be unanimous.

The contract may also attribute to each member a number of votes which is different from that allocated to others; failing this, each member shall have one vote.

Any meeting must obligatorily be called at the request of at least one quarter of the group members.

Cl. 9. (*Law n° 89-377 of the 13 June 1989, cl.21*) - The group shall be administered by one or more persons. A body corporate may be appointed as director for the group on condition that it nominates a permanent representative, who shall bear the same civil and penal responsibilities as if he were a director in his own right. The director (s) of the group, and any permanent representative of a body corporate appointed as director shall be responsible, individually or jointly as the case may be, towards the group or towards third parties, for any breach of legislative or regulatory provisions which apply to groups, for any breaches of the articles of the group, in addition to for any management defects. If several directors have taken part in the same events, the courts shall determine the extent of the contribution of each of them in the reparation of damages. (*Order n° 67-821 of the 23rd September 1967*) Save for this condition, the group contract or, failing this, the meeting of the members may freely organise the administration of the group and appoint such directors with such functions powers and conditions for dismissal as it chooses.

(*Order n° 67-821 of the 23rd September 1967*) In relations with third parties, a director may bind the group by any deed which is covered in the purposes of same. Any limitation of powers shall not be defendable against third parties.

Cl. 10 (*Order n° 67-821 of the 23rd September 1967*). - Management control, which must be entrusted to physical persons, and accounting control shall be exercised under the conditions set out in the contract which constitutes the group.

(*Law n° 84-148 of the 1st March 1984, cl. 24*) Nevertheless, when a group issues stock under the conditions set out in clause 5, management control must be exercised by one or more physical persons appointed by the meeting ; the duration of their duties and their powers shall be determined in the contract.

(*Law n° 84-148 of the 1st March 1984, cl. 24*) Accounting control in groups covered by the previous paragraph and in groups which have one hundred or more employees at the cut-off of an accounting period must be exercised by one or more auditors chosen from the list referred to under clause 219 of the law n° 66-537 of the 24th July 1966 as amended on commercial companies and appointed by the meeting for the duration of six accounting periods. The provisions of said law concerning incompatibilities, powers, duties, functions, responsibility, repudiation, revocation and remuneration of the auditors for public companies in addition to the penalties set out in clause 457 of the law of the 24th July 1966 referred to above shall be applicable to the auditors of economic interest groups save for the regulations which appertain purely to the latter.

(*Law n° 84-148 of the 1st March 1984, cl. 24*) In the cases covered in the two previous paragraphs, the terms of clauses 455, 456, and 458, 470 to 479 of the law referred to of the 24th July 1966 shall be applicable to the directors of the group, to the physical persons who are directors of company members or the permanent representatives of bodies corporate which administer such companies.

Cl. 10-1 ((*Law n° 84-148 of the March 1984, cl. 25*) - In groups ((*Law n° 88-15 of the 5th January 1988, cl. 35*) which meet the criteria set out in clause 340-1 of the law n° 66-537 of the 24th July 1966 on companies, directors shall be required to keep a balance of realisable and disposable

assets, excluding operating values, and demandable debts, forecast profit and loss accounts, and a table of loans in addition to the annual accounts and a forecast financing plan.

A decree of the Council of State shall define the frequency, periods and terms for drawing up such documents.

Cl. 10-2 (*Law n° 84-148 of the 1st March 1984, cl. 25*) - The documents referred to under clause 10-1 shall be analysed by written reports on the development of the group drawn up by the directors. The documents and reports shall be communicated to the auditor and to the works committee.

In the case of failure to observe the terms of clause 10-1 and the previous paragraph, or if the information given in the reports referred to under the previous paragraph require any observations on his part, the auditor shall notify this in a report to the directors or in the annual report. He may request that his report be sent to group members or that it be brought to the attention at the meeting of the members. The report shall be made known to the works committee.

Cl. 10-3 (*Law n° 84-148 of the 1st March 1984, cl. 25*) - The auditor shall ask for explanations in writing from directors who shall be required to answer, under the conditions and timing set by the Council of State, on any fact whose nature might compromise the continuity of operations which he might note in the course of his duties. Directors shall give an answer to the auditor within 15 days. The answer shall be conveyed to the works committee. The auditor shall inform Court's President.

In the case of failure to observe these terms, or if, despite the decisions taken, he notes that the continuity of operations remains compromised, the auditor shall prepare a special report. He may require that the report be addressed to the members of the group or that it be presented during the next meeting. The report shall be conveyed to the works committee.

If at the end of directors' meeting, the auditor notices that the decision taken will not secure the continuity of operations, he shall inform the Court's President of his interventions as well as their results.

Cl. 10-4 (*Law n° 84-148 of the 1st March 1984, cl. 25*) - The works committee or, failing this, the staff delegates shall exercise in economic interest groupings the attributions which are set out in clauses L. 422-4 and L. 432-5 of the Employment Code.

The directors shall convey to the auditor any requests for explanations made by the works committee or by staff delegates, any reports sent to them and the answers they have made in application of clauses L. 422-4 and L. 432-5 of the Employment Code.

Cl. 11- Deeds and documents issued by the group and destined for third parties, in particular the letters, invoices, advertisements and sundry publications must indicate the name of the group legibly followed by the words: (Law n° 89-377 of the 13th June 1989, clause 22) "groupement d'interet economique" [economic interest group] or the acronym "G.I.E.".

(*Order n° 67-821 of the 23rd September 1967*) Any breach of the terms of the above paragraph shall be punished by a fine of F 25 000F.

Cl. 12 - Any company or association whose purpose corresponds to the definition of an ecnomic interest group may be changed into such a group without giving rise to dissolution nor the creation of any new body corporate.

(*Law n° 89-377 of the 13th June 1989, cl.23*) An economic interest group may be changed into a company under a collective name without giving rise to dissolution nor the creation of any new body corporate.

Cl. 13 - An economic interest group shall be dissolved:
1. Through expiry of its term;

2. Through the realisation or extinction of its purpose ;
3. Through the decision of its members under the terms set out in clause 8;
4. Through judicial decision with just cause ;
5. Through the decease of a physical person or by the dissolution of a body corporate which is a member of the group, save for any provision to the contrary in the contract.

Cl. 14 - If one of its members were to be judged incapable, in personal bankruptcy or prohibited from administering, managing, directing or controlling a commercial company, in any form whatsoever, or of a common law non-commercial body corporate, the group shall be dissolved, unless its continuation is set out in the contract or the other members unanimously decide it.

Cl. 15 - The dissolution of an economic interest group shall bring about its liquidation. The legal personality of the group shall subsist for the requirements of the liquidation.

Cl. 16 - Liquidation shall take place in accordance with the terms of the contract. Failing this a liquidator shall be appointed by the meeting of group members or, if the meeting has not been able to carry out such appointment, by judicial decision.
After payment of debts, the excess of any assets shall be shared amongst the members under the terms set out in the contract ; failing this distribution shall be in equal shares.

Cl. 17 (*Law n° 89-377 of the 13th June 1989, cl. 24*) - The identification as "groupement d'interet economique" [economic interest group] or the acronym "G.I.E." may only be used by groups covered by the terms of the present order. Illicit use of this wording, this acronym or any expression of such a nature as to lead to confusion with such bodies shall be sanctioned by imprisonment for a year and a fine of F 40,000, or one of these penalties alone.

(*Order n° 67-821 of the 23rd September 1967*) The tribunal may, furthermore, order the publication of the judgment, at the costs of the convicted, in a maximum of three newspapers

and its being posted under the terms set out in clause 131-35 of the Penal Code.

Cl. 18. - Deeds for the formation of economic interest groups shall bring about the collection of investment duties under the terms set out in clause 714, I (1st paragraph) of the General Tax Code.

Cl. 19. - Economic interest groups which are constituted and which operate in the terms set out in the preceding clauses shall not come into the field of application of clause 206, I of the General Tax Code, but each of its members shall be personally responsible, for the share of profits which corresponds to its rights within the group, either for income tax for physical persons, or for corporation tax if the member is a body corporate liable to such tax.

For the application of this term, apportionment shall be carried out under the conditions set out in the group contract, or failing this, in equal proportions.

Cl. 20 - 1. The change of a capital company or of a association constituted in accordance with the law of the 1st July 1901 into an economic interest group shall be deemed to be transfer of the company and shall bring about an assessment for corporation tax under the terms set out in clause 201 (1 to 3) of the General Tax Code.

II. 1. Such a change may, by way of exception to the terms of clause 111 *bis* of the General Tax Code, be carried out on payment of a lump sum tax of 15% of the profits and reserved whether capitalised or not.

This tax, which frees from any income tax shall be collected according to the rules and subject to the penalties which are applicable to stamp duties.

It is not accepted as deduction from the tax base of physical person income tax nor from corporation tax.

2. Apportionment carried out under the regulations defined in 1 shall not give rise to tax credits as referred to under clause 158 *bis* of the General Tax Code.

3. The application of the provisions of II (1 and 2) shall be subject to the condition that the deed which notes the change must be registered prior to the 1st January 1971.

Cl. 21. - The members of an economic interest group have the benefit of the same tax advantages as the members of approved companies constituted by order n° 59-248 of the 4th February 1959 and the groups referred to under section 2 of clause 38 *eight* of the General Tax Code, when the fulfil all the conditions set out by these terms.

Cl. 22 - With the exception of terms 18 to 21, the present order shall be applicable in the overseas territories and New Caledonia, in French Polynesia, the Comores, Saint Pierre et Miquelon and Wallis and Futuna.